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An ordinance of the city of Chicago, imposing a tax upon bicycles has recently been declared invalid by Judge Tuley, one of the judges of the Circuit Court of Cook County. He held, in substance, that the ordinance was void in that it was not properly a license justifiable under the police power of the municipality, but was in reality a tax for the purpose of raising revenue, under a guise of a license, for the city; that it was unconstitutional in that it was not uniform, being a tax of the same amount on property of different values; that it was a tax upon the property of certain designated individuals or classes, which property had already been taxed under the revenue laws according to its value, and was thus forced to bear a double taxation. The action was a suit in equity to enjoin the enforcement of the ordinance in question, and the court held substantially that a court of equity had jurisdiction to enjoin the enforcement of an illegal ordinance such as he held this one to be; that public officers charged with the enforcement of the laws are practically trustees for the tax-paying public, and that the enforcement of an illegal ordinance by such officers was a breach of trust, for the prevention of which a court of equity would take and maintain full jurisdiction.

The case of *Bergeron v. Hobbs*, recently before the Supreme Court of Wisconsin, in which one of the members of the court dissented in a vigorous opinion, involved the controverted question of the sufficiency of technically irregular incorporation as a defense to an action against the would be incorporators as partners. It appeared that a provision of the Wisconsin statute, under which the defendants attempted to incorporate an agricultural association, required the "filing" of the certificate of organization, with other papers, in the office of the register of deeds. It was held that a deposit of the papers with the proper register, with instructions to record and return them, was not a sufficient "filing" to enable the proposed cor-

poration to come into being, and that the defendants were therefore personally liable for claims for labor in improving grounds, and otherwise forwarding the intended corporate enterprise. As the dissenting opinion of Judge Marshall shows, this conclusion is opposed to the weight of authority. The court cited in support of its view *Beach, Priv. Corp.* §§ 16, 162b, and 1 *Thompson on Corp.* §§ 239, 416, 417, to the effect that unless all the conditions precedent to the creation of a corporation are performed, there can be no corporation in fact and that the members of the pretended corporation will be personally liable. Judge Marshall, however, shows very clearly that the force of these text-writers as authority on this point is destroyed by an unsuccessful effort by them "to harmonize conflicting decisions that proceed on theories so opposite that harmony is impossible. If we hold," he says, "with Missouri, Arkansas, and some other States, that unless all the steps necessary to the creation of the corporation have been taken there is no corporate existence, and that the members of the association are personally liable, we, in effect, say that it is not sufficient to enable such members to escape personal liability to show that their organization is a corporation *de facto*; that nothing short of a corporation *de jure* will do. But if we adopt the growing doctrine, supported, as we shall show, by the overwhelming weight of authority in this country, that a person who contracts with a *de facto* corporation, the members of the latter and such person believing, in good faith, in its legal existence, such members cannot be held personally liable, then we concede, necessarily, that it is not essential to freedom from such liability that all the statutory requisites to the existence of a corporation be complied with, because, when that is done, the organization, obviously, is not a corporation *de facto* only; it is a corporation *de jure*." The dissenting judge states the true doctrine to be "that it is sufficient to constitute a corporation *de facto*, as against one who has recognized its corporate existence, that there be a law under which it might exist *de jure*, an attempt in good faith to organize under said law, and a subsequent user of the assumed corporate powers." "The very meaning of the term *de facto*," says Judge Marshall in another portion of his able opinion, "indicates that

nothing more is necessary to the existence of a *de facto* corporation than the exercise of corporate powers in good faith. Corporation *de facto*—that is, a corporation from the fact that it is acting as such under color of right in good faith. The existence of the law, and some attempt to comply with it, are essential, because without them there can be no assumption of the right to corporate existence in good faith. Persons cannot be said to honestly obtain the right to corporate existence, in the absence of any law authorizing the organization, or in the absence of some honest attempt to comply with such law. The law and such attempt, or user of the franchise, whatever mistakes may be made in so doing—such as the filing of articles of organization when they are required to be recorded or the recording of articles when they are required to be filed, or the filing of such articles in the wrong office, or any other of the numerous mistakes that might be made, make a corporation good everywhere, in all courts and places, till successfully challenged by the State. There is hardly any end of authority, all in harmony on this subject, but we content ourselves by referring to the following additional cases: *Hass v. Bank*, 41 Neb. 754, 60 N. W. Rep. 85; *Lake Church v. Froislie*, 37 Minn. 447, 35 N. W. Rep. 260; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. Rep. 658; *Stout v. Zulick*, 48 N. J. Law, 601, 7 Atl. Rep. 362; *McCarthy v. Lavasche*, 89 Ill. 270; *Hudson v. Seminary Corp.*, 113 Ill. 618; *City of St. Louis v. Shields*, 62 Mo. 247; *Central A. & M. Association v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Palmer v. Lawrence*, 3 Sandf. 161; *North v. State*, 107 Ind. 356, 8 N. E. Rep. 159." The New York Law Journal in connection with the Wisconsin case calls attention to the recent case of *Demarest v. Flack*, 16 Daly, 337, 123 N. Y. 205. In the course of the opinion in that case the court remarks: "There is an overwhelming current of authority throughout the United States on the point that where a corporation has once come into actual existence through the due observance of the original formalities required for that purpose, subsequent omissions or irregularities in the completion of its organization or the prosecution of its business shall not be available as a defense in matters of contract, either to the

corporation itself or its directors or stockholders, and cannot be taken advantage of by outsiders who have had business dealings with it."

NOTES OF RECENT DECISIONS.

CARRIERS OF PASSENGERS — INJURY — CROWDED CARS—CONTRIBUTORY NEGLIGENCE. —In *Chesapeake & Ohio Ry. Co. v. Lang's Admr.*, decided by the Kentucky Court of Appeals, it was held that a passenger on a crowded excursion train is not guilty of contributory negligence, in standing on the platform, there being only standing room inside the cars, and, therefore, there may be a recovery for his death resulting from a collision caused by the negligence of the railroad company, although he might not have been killed if he had been inside the car. The court said, in part: "While the doctrine is that where a passenger voluntarily and unnecessarily places himself in a position of danger, and his own neglect causes the injury, and but for his folly the injury would not have happened, no recovery can be had, it has but little, if any, application to the facts of this case. It is not *per se* negligence to be upon the platform, says Mr. Beach in his work on Contributory Neglect, and in cases where by cheap rates persons are invited upon and their passage accepted to travel on these excursion trains, it is no defense on the part of company to say that you might have stood in the car and not on the platform and, therefore, no responsibility exists. The tender was in front of the engine, and the view of the approach to the switch obstructed by it, and if not it is manifest that with any sort of care this danger could have been avoided. The jury, however, was told that if from the testimony there was room in any car for the intestate, and that he could have entered the same, and that he remained on the platform where he was injured without the knowledge of the conductor, or against his objections, or that of any agent of the company, the verdict should be for the defendant. This instruction was more favorable to the defense than it should have been upon the facts of the record. The entire testimony shows the cars were greatly crowded, young ladies seated upon

the coal box, with the platform filled with passengers, so much so as to prevent those on the ground from entering the cars, and where such inducements are given by which cars are filled inside and out with passengers, it is doubtful whether the position of the passenger on the train, unless so reckless as to knowingly place himself in imminent peril, should be held to be contributory neglect."

VENDOR AND PURCHASER — CONVEYANCE OF DEFECTIVE STRUCTURE — LIABILITY OF GRANTOR. — A grantor who delivers to the grantee a deed of land on which there is a defective structure, and surrenders possession thereof to him, is not liable to one of the public thereafter injured because of the defect, since the duty to repair the structure is assumed by the grantee from the time of such delivery and surrender. The Supreme Court of Pennsylvania so decides in *Palmore v. Morris*, 37 Atl. Rep. 995. The court says that "the authorities on the exact question are very meager. As between a landlord and tenant at will or for a term, the weight of authority is that the landlord continues answerable, though out of possession, for injuries resulting to third parties from negligently constructed buildings and structures on the land where they were erected by the landlord. The very letting by him of to him known defective property, without stipulation for repair, is significant of continuous negligence on his part. *Godley v. Haggerty*, 20 Pa. St. 387, and the cases following it down to *McKenna v. Paper Co.*, 176 Pa. St. 306, 35 Atl. Rep. 131. But this is not a letting of the land by a landlord to a tenant; it is an absolute sale, whereby the owner divests himself of title, and all right to possession, or of re-entry for repairs, or for any other purpose. Any future possession in face of his deed, unless there be an independent stipulation to the contrary, would be a palpable trespass; and with his surrender of possession all the duties incident to ownership, as to him, were at an end. From the moment Lodge took possession under his deed the duties theretofore incumbent on Morris, Tasker & Co., were transferred to him, and he became answerable to the public for neglect in their performance. The learned judge of the court below adopts a different event for the commencement of lia-

bility on the part of the grantee than possession taken under the deed. He says, "He ought, within a reasonable time, to see that the property which he had purchased, if it was in dangerous condition to the public, was put in repair." That is, he imports into the deed an implied covenant on part of the grantors that they will be answerable to third parties for defects in the building for a reasonable time after the grantee takes possession. Public policy does not demand that such clogs on the transfer of real estate should be imposed by construction, nor does the law warrant such an implication."

TAXATION—LIABILITY OF ASSESSOR FOR MALICIOUS EXCESSIVE ASSESSMENT.—The United States Circuit Court for the Northern District of California, decides in *Bailey v. Berney*, that an assessor, though acting judicially when listing property for assessment, and not liable for mere errors or mistakes of judgment, is liable for damages resulting from an excessive assessment made maliciously or corruptly. There is undoubtedly considerable conflict of authority on the proposition. Such an eminent jurist as Judge Cooley maintains that, as the duty of an assessor in listing the value of property for taxation is of a judicial character, that officer is clothed with a complete immunity from private suits, not alone for mere errors of judgment, but for his willful, malicious, and corrupt motive in making an excessive assessment. *Cooley, Taxn.* p. 556. To the same effect are *Mechem, Pub. Off.* p. 424, § 640, and the following cases: *Wilson v. Mayor, etc.*, of New York, 1 Denio, 595; *Weaver v. Devendorf*, 3 Denio, 117; *Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Steele v. Dunham*, 26 Wis. 393. The only recourse, according to this line of authority, lies in a criminal proceeding against the delinquent assessor for his malicious and corrupt conduct. On the other hand, what seems, at the present day, to be the greater and better weight of authority supports the doctrine that while assessors are not liable to private suits for mere errors or mistakes of judgment in making excessive assessments upon property, so long as they had jurisdiction to make the assessment, they will be held liable in damages for making an excessive assessment with a malicious, corrupt, or other sinister motive. From the

opinion of United States Judge Morrow, we clip the following:

The general rule is thus summarized in 19 Am. & Eng. Enc. Law, p. 486: "It may be laid down as a general rule that a judicial officer acting within his jurisdiction is not liable, in an action for damages, for any judgment he may deliver. And for the purpose of exemption under this rule an officer who acts judicially for the time being is considered a judicial officer, although he may also perform ministerial duties. In order to be entitled to this protection, however, the officer must act within his jurisdiction, and in good faith, without fraud or malice; and the burden of proof is on the plaintiff to show that the officer acted maliciously and in bad faith." The following cases recognize the general rule referred to: *Gould v. Hammond*, 1 McAll. 235, Fed. Cas. No. 5638; *Gregory v. Brooks*, 37 Conn. 365; *Porter v. Haight*, 45 Cal. 631; *Green v. Swift*, 47 Cal. 536; *McCormick v. Burt*, 95 Ill. 263; *Elmore v. Overton*, 104 Ind. 548, 4 N. E. Rep. 197; *Gregory v. Small*, 39 Ohio St. 346; *Burton v. Fulton*, 49 Pa. St. 151; *Morgan v. Dudley*, 18 B. Mon. 698; *Chrisman v. Bruce*, 1 Duv. 63; *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. Rep. 530; *Keenan v. Cook*, 12 R. I. 52; *Parkinson v. Parker*, 48 Iowa, 667; *Williams v. Weaver*, 75 N. Y. 30; *Apgar v. Hayward*, 110 N. Y. 225, 18 N. E. Rep. 85. See, also, cases cited in the above citation from 19 Am. & Eng. Enc. Law, p. 489. It may be observed, further, that there is another line of cases which makes a distinction between public officials who are judges and justices of the peace (that is, those who act in a distinctively and exclusively judicial capacity) and those other public officials who act merely in a quasi-judicial capacity, such as assessors and the like. *Pike v. Megoun*, 44 Mo. 491; *Elmore v. Overton*, 104 Ind. 548, 4 N. E. Rep. 197; *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. Rep. 651; *Cooley, Torts* (2d Ed.), p. 480, and cases there cited. In *Pike v. Megoun*, *supra*, it was said: "An action, then, does not lie against judges or magistrates, or persons acting judicially, in a matter within the scope of their jurisdiction, however erroneous their judgment, or corrupt and malicious their motives. But there is a limit to this judicial immunity. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty." The distinction made appears to me to be a correct and logical one. It certainly tends to remove much of the perplexity that would otherwise attend the subject. The reasons why a judge, justice of the peace, or a juror should be completely exempted from private suits for their judicial acts are much stronger, from the standpoint of public policy, than apply to a public officer discharging quasi-judicial functions, such as an assessor. As was well said in *Scott v. Stansfield*, L. R. 3 Exch. 220: "This provision of the law is not for the protection or benefit of a malicious or corrupt

judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." Many of the cases cited by counsel for defendants involved suits where it was attempted to sue judges, justices of the peace, and jurors. These cases are therefore to be distinguished from the case at bar. The authorities in this State—keeping in mind the distinction heretofore made between judicial officers and those acting in a quasi-judicial capacity in connection with their ministerial duties—accord with the rule that where malice is expressly alleged, as in the case at bar, a suit can be maintained against an assessor for an excessive assessment. In *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. Rep. 530, a suit was brought against a county assessor and the sureties upon his official bond, as in the case at bar, alleging that the assessor willfully and against law assessed a tract of land belonging to plaintiff at an unlawful and false valuation, which was largely in excess of a sum alleged to be its highest actual value for agricultural purposes. It was held that the averment of the value of the property, to-wit, "highest actual value for agricultural purposes," was insufficient, and, further, that the averment that the assessment was willful and against law, without an averment that he acted maliciously and with intent to wrong or injure the owner of the property, did not negative the presumption that he simply erred in judgment, for which he was not liable to an action. In other words, it was there held that as the complaint did not aver, among other things, that the assessor had been actuated by malice, the demurrer should be sustained. The effect of this decision, so far as it is applicable to the present case, is to hold that, had there been an averment of malice in the complaint, the demurrer would have been overruled, and the suit could have been maintained; assuming, of course, that the complaint was sufficient in other respects. In *Porter v. Haight*, 45 Cal. 631, it was held that the board of State prison directors, in annulling a contract they had made for the employment of convict labor, acted in a judicial, and not a ministerial, capacity, for which, if they acted without fraud or malice, they did not incur any personal liability. In *Green v. Swift*, 47 Cal. 536, it was held that a board of commissioners appointed by an act of the legislature, with power to turn or straighten the channel of a river in order to protect a populous portion of the country from threatened inundation, are not liable for damages to others caused by the work, resulting from mere errors of judgment in the commissioners, provided they keep within the scope of their powers, and exercise their judgment honestly, and do not act maliciously, oppressively, or arbitrarily. Mr. Justice Wallace, in rendering the opinion of the court, said: "They (the commissioners) were to exercise their judgment honestly, and to do the work, of course, with proper care and caution, and not maliciously, oppressively, or arbitrarily, to the injury of the rights of other persons. But, keeping within the scope of these powers, they are not to be held liable for mere errors of judgment, nor for injuries to others resulting from the work itself, if properly performed and with due care. Otherwise, as remarked by Lord Kenyon, every statute of this character 'would give rise to an infinity of actions,'" citing *Governor, etc. v. Meredith*, 4 Term R. 796.

WITNESS — COMPETENCY — TRANSACTIONS
WITH DECEDENT.—In *Bailey v. Holden*, 71

N. W. Rep. 841, decided by the Supreme Court of Michigan, it was held that one claiming under a deed cannot testify as to facts equally within the knowledge of his deceased grantor as against those claiming under a second deed, and who set up that the first deed had been revoked in view of 3 How. Ann. St. sec. 7545, which provides that where a suit is defended by the assigns of a deceased person the opposite party shall not be permitted to testify as to matters which must have been equally within the knowledge of the deceased person. The court said in part:

The original bill was filed by the complainant to remove a cloud from the title to lands claimed to be owned by him. The bill alleges that the complainant acquired his title through a conveyance made on the 21st of November, 1893, to him by his wife, Mary; that he went into actual possession of the land, and has remained in possession ever since; and that on the 10th of November, 1894, his wife, Mary, died intestate, and without issue. The bill avers that the defendant, John Holden, on the day of the death of complainant's wife, caused a conveyance of the premises in question from Mary Bailey to defendants Carrie F. Holden, Frank H. Holden, Pearl G. Holden and Bernice N. Holden, purporting to have been executed on the 29th of October, 1894, to be placed on record. The defendant John Holden is a brother of Mary Bailey, deceased, and the other defendants are his minor children. Defendants, by their answer and cross-bill, aver that the conveyance under which complainant claims was procured by means of influence which complainant had over his wife, and was executed with the express understanding that it was to operate and be considered as a will of Mary Bailey, and to take effect only at her death, and that she reserved the full power of revocation. The case turned below, and must turn here, upon the determination of the question as to whether the conveyance was made as an absolute conveyance, or with the purpose that it be delivered and take effect after the death of Mary Bailey; and this is mainly a question of fact. Three persons besides the deceased were present when the deed to complainant was signed. They were complainant himself, an attorney named Lowden, who had driven out to the residence of deceased and complainant for the purpose of taking the acknowledgment of the deed, and who had in advance prepared the deed for execution, and a domestic, Miss Hazel. A preliminary question is made as to whether complainant is a competent witness to testify to facts equally within the knowledge of his deceased wife. The statute (section 7545, 3 How. Ann. St.) provides that "when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters, which, if true, must have been equally within the knowledge of such deceased person." Defendants are the assigns of Mary Bailey. They claim under a deed executed by her in due form, to defeat which it is necessary to show that she had parted with title prior to the date of the deed to defendants, and the testimony which complainant offered was for the purpose of establishing this fact. In *Ripley v. Seligman*,

88 Mich., at page 189, 50 N. W. Rep. 145, Mr. Justice Champlin said: "The word 'assigns' is used here in its legal sense, and signifies a person to whom any property or right is transferred by a deceased person in his life-time. The statute is broad enough to cover successive transfers, or where the controversy depends upon the acts or dealings with the property of the deceased in his life-time; and any one who is called upon to prosecute or defend some interest which is affected by the act or agreement of the deceased party through whom he claims may invoke the protection of the statute to shield his interest from the testimony of the opposite party to matters which, if true, were equally within the knowledge of the deceased person through whom he claims." In *Schuffert v. Grote*, 88 Mich. 650, 50 N. W. Rep. 657, a son filed a bill to set aside a deed executed by his father, since deceased, to the defendant, and confirm the title to the land in the complainant under a prior deed executed to complainant by the father. It was held that the testimony of the complainant as to the execution of the first deed, as to what took place between his father and himself, was excluded by the statute. The case is on all fours with the present. In *Lloyd v. Hollenback*, 98 Mich. 203, 57 N. W. Rep. 110, a daughter of her deceased father filed a bill alleging an agreement to give complainant certain property in consideration of a life support, and to set aside a deed executed by her father in his life-time to defendant. The statute was held to exclude her testimony. See also, *Connolly v. Keating*, 102 Mich. 1, 60 N. W. Rep. 289.

Complainant cites, to sustain the admissibility of the testimony, the case of *Latourette v. McKeon*, 104 Mich. 156, 62 N. W. Rep. 153. In that case the action was brought against the maker of a note by one claiming to be the assignee of the deceased payee. No representative of such deceased payee was prosecutor or defendant in the suit. But in the case of *Hillman v. Schwenck*, 68 Mich. 297, 36 N. W. Rep. 670, cited in *Latourette v. McKeon*, it was said: "If the executor had indemnified the defendants, or had taken upon himself the defense of the suit, the statute excluding the plaintiff from testifying to matters which were equally within the knowledge of the deceased would have applied." So, in the case of *Brown v. Bell*, 58 Mich. 58, 24 N. W. Rep. 824, and *Schofield v. Walker*, 58 Mich. 96, 24 N. W. Rep. 624, it was held that the testimony of the proponent of a will is not excluded, for the reason that there is no "opposite party" representing the estate of the deceased. If the case of *Lautenschlager*, 80 Mich. 285, 45 N. W. Rep. 147, is to be deemed a misapplication of the doctrine of *Brown v. Bell*, the distinction has since been made in the later cases above referred to, and the rule firmly established. We think the testimony of the complainant was not competent.

NUISANCE — GUNPOWDER INJURIES BY EXPLOSION—LIABILITY. — It is held by the Supreme Court of Alabama in *Kinney v. Koopman*, that gunpowder kept in large quantities in public places is not dangerous, and *per se* a nuisance at common law, without regard to the manner of its use or keeping. The statute of that State makes the keeping of more than 50 pounds of gunpowder, for sale or use, within the corporate

limits of any city or town, a misdemeanor. It was held that one who keeps gunpowder in violation of such statute is liable to a person intended to be protected by it for injuries to property caused by an explosion of the powder. The following is from the opinion of the court:

The question of care and diligence does not arise in a case of damages resulting from a nuisance *per se*, because the thing itself was unlawful. Courts have not always been careful to maintain the difference in cases where suit was brought to recover damages resulting from a cause that is a nuisance *per se* and damages resulting from the manner of the use of the thing. The rule of "*sic utere*" requires a person to so use his own as not to injure another, and he is responsible for the failure to do so whether the "thing" used be a nuisance *per se* or made so by its use. The reasoning is not sound that concludes "a thing" to be a nuisance *per se* because in its use injury has resulted. The blasting of rocks is not *per se* unlawful. But when a person undertakes to blast rocks, whether in a city or in the country, he may become responsible for the damage inflicted upon the person or property of others; this not solely because of the explosive material used to effect the blasting, but because of the damage resulting from the means used and place and manner of using. A person who would cut a tree down with an ax, standing on his own right of way, so as to fall upon the house of another, would be responsible, and equally liable as if a huge rock had been thrown by blasting upon the house. So a city or person may be liable in damages for a nuisance by causing water to leave its natural course, and overflow the lands of another; but this does not argue that water *per se* is a nuisance, but only that the manner of its use may become such. The result does not conclusively determine that the means or instrument used was dangerous, but may show that on account of the place and the manner of the use it was such.

It has been frequently held that the law as to explosives is the same as that which applies to keeping dangerous and vicious animals. A dog, however vicious, may be secured so as to render it absolutely harmless. A dog thus kept on one's own premises is not a nuisance *per se*, because it cannot work a hurt to another. If, however, the dog escapes, and upon the highway or upon the private premises of another commits an injury, the owner is liable. Every menagerie or zoo having dangerous and wild animals for exhibition, however securely caged, would be guilty of a nuisance *per se* if the mere having such animals in cities or on the highway constituted a nuisance. Steam is dangerous, and at times, suddenly, without warning, there are explosions from steam, causing destruction of property and death. If the fact that explosions do occur, causing damage, was conclusive that steam power was a nuisance *per se*, manufacturing in towns and near other people's premises must cease. Under such a rule, all steamboating and railroading would be nuisances *per se*. Is gunpowder kept in large quantities in public places dangerous, and *per se* a nuisance, without regard to the manner of its use or keeping? When we consider the vast number of government magazines in this country and throughout the world, its daily transportation by every known power of conveyance, its daily use by millions of persons in war, or for blasting, or for

amusement, with scarcely a single well-authenticated instance of spontaneous combustion, it cannot be said that gunpowder *per se* is dangerous. The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing itself. It is public because of the danger to the public. It is private only because the individual, as distinguished from the public, has been or may be injured. Public nuisances are indictable. Private nuisances are actionable, either for their abatement, or for damages, or both. If the storing of gunpowder so near another's dwelling in the country, where there is no other building, that an explosion would damage the owner, be not a private nuisance *per se*, the storing of the powder in a city will not be a public nuisance *per se*. The decisions of the supreme or appellate courts of different States are not uniform in their statements of the law. We will refer to a few of the leading cases.

The case of *Ladlin v. Tearney*, 131 Ill. 322, 23 N. E. Rep. 389, 19 Am. St. Rep. 34, 7 Lawy. Rep. Ann. 262, at first reversed, and on rehearing affirmed, shows that the complaint was not demurred to, and it was held that the first count, which averred the keeping of the powder magazine, its explosion, and consequent damages, contained a sufficient cause of action to support a judgment. The court held that this count showed that the defendant kept a powder magazine "upon its premises, so situated with reference to the dwelling house of the plaintiff that it was liable to inflict serious injury upon her person or property in case of explosion. It was a private nuisance, and therefore the defendant was liable whether the powder was carefully kept or not." The second count charged that the powder was kept in violation of a city ordinance. The court held that the keeping of the powder was an illegal act, and "the defendant was responsible for all consequences resulting from the act."

The case of *McAndrews v. Collierd*, 42 N. J. Law, 189, 36 Am. Rep. 508, was a case where the defendant had collected a magazine of explosives to be used for blasting within the city limits of Jersey City. A statute of the State had declared the keeping of explosives within the limits of a city in larger quantities than a specified amount to be a misdemeanor. In discussing the question generally, the court stated that the keeping of gunpowder in large quantities in the vicinity of a dwelling house is a nuisance *per se*.

The case of *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734, was a case where a powder house was erected in a populous part of the city, and which was exploded by lightning. The court held "that the erection of a powder magazine in a populous part of a city, and keeping stored therein large quantities of gunpowder, is *per se* a nuisance." The court uses the following argument: "The fact that it is liable to explode by means of lightning, against which no human agency could guard, is decisive of the question. If the explosion could only be produced by human agency, there would be much force in the reasoning of the majority of the court (in *People v. Sands*, 1 Johns. 78) that the question whether it was a nuisance or not depends upon the manner in which it is kept, because there might be a building so secure, and a method of keeping it so careful, as that danger would not be apprehended," etc. If the conclusion of the court had been that the powder house in question was so constructed that it was liable to be exploded by lightning, and the fact that it was so exploded was conclusive that it was not properly constructed, there would be "much more force in the

reasoning of the court." But when the court undertakes to declare that it is impossible to protect a powder house from lightning, and bases its conclusion that a powder house in a populous city is a nuisance *per se* from such a premise, we are not prepared to assent, without some further reason. We do not know judicially that a powder magazine may not be constructed and so provided as to insure absolute security from lightning. We do not think the criticism upon the argument of Chief Justice Kent is well maintained.

In the case of *Wilson v. Powder Co.*, 40 W. Va. 413, 21 S. E. Rep. 1035, 52 Am. St. Rep. 890, it was declared that "the manufacture and keeping of quantities of gunpowder, nitroglycerin, and other explosives in or dangerously near to public places, such as towns or highways, is a public nuisance, and indictable as such. . . . Negligence is no material element," etc. It will be observed that "manufacturing and keeping of large quantities of gunpowder" was declared to be a nuisance. It was a manufacturing of powder as well as the keeping of powder that exploded in this case. We will not discuss the question of the manufacture of explosives, and refer to the case for the purpose of considering some of the statements and propositions of the court. It is said: "Now, if this mill were located in a secluded place, and removed from highways, being in itself a lawful business, the case would be different. It would not be a public nuisance; and to recover injury from an explosion I apprehend the plaintiff must show negligence on the defendant's part." If the thing be a nuisance *per se*, and injury results to another's premises, no rule of law requires evidence of negligence. A private nuisance *per se* is actionable, as much so as a public nuisance. The only difference is that, in order to maintain an action in his individual name, he must show an injury not common to others. Whatever constitutes a public nuisance as to the public will constitute a private nuisance, if established so as to have the same effect upon the premises or health of a private person as it would have upon the public if established in a city or highway. The constituents and definitions of a nuisance, whether public or private, are the same. It becomes a public or private nuisance as it affects the public or the individual only; but we do not see how the fact that the "place" is public can determine the "thing" to be a nuisance *per se*. Certainly, the place does not bring it within the common-law definition. The opinion, referring to the case of *People v. Sands*, 1 Johns. 78, *supra*, says later New York cases have overruled it. We presume the court referred to the cases of *Heeg v. Licht*, 80 N. Y. 579, and *Myers v. Malcolm*, 6 Hill, 292, as these are the only New York cases cited. The case of *Heeg v. Licht*, *supra*, 36 Am. Rep. 654, has been cited in most of the decisions which hold that a powder magazine erected in a public place, or near the premises of another, in which powder is kept, is a nuisance *per se*, as supporting that proposition. We do not fully and clearly apprehend all the principles intended to be laid down as applicable to the facts in the case of *Heeg v. Licht*. It was admitted that the defendant had gunpowder stored in his magazine, that it exploded, and caused the damage to the buildings of the plaintiff. The trial court instructed the jury that plaintiff could not recover unless they found that the defendant "carelessly and negligently kept the gunpowder on his premises." It was held on appeal that "this charge was not warranted by the facts." The trial court refused to instruct the jury "that the powder magazine was dangerous in itself to plaintiff

and his property, and was a private nuisance," etc. On appeal it was held that this charge was properly refused. The case, then, is this: The defendant stored gunpowder and other explosives in a magazine in such quantities and close contiguity to the building of the plaintiff that an explosion was liable to damage and did damage the plaintiff and his property. On these undisputed facts it was held on the one hand that the facts did not warrant the court to charge the jury that plaintiff "could not recover unless he showed negligence;" and on the other, that these facts did not show that "the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance," etc. As we read the case, it was disposed of in the following proposition: "The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether, from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance," etc. Certainly nothing can be found here which authorizes, as a legal conclusion, from locality and quantity only, that storing of gunpowder is a nuisance *per se*. There must be "other surrounding circumstances," and it depends upon the facts of the case whether the party is guilty of maintaining a nuisance.

In the case of *Cosulich v. Oil Co.*, 122 N. Y. 118, 25 N. E. Rep. 259, 19 Am. St. Rep. 476, the damages resulted from an explosion of petroleum. The court held that the business of the defendant was lawful, and that it was incumbent upon the plaintiff to show a want of due care.

In the case of *Walker v. Railway Co.*, 71 Iowa, 668, 33 N. W. Rep. 224, the damages resulted from an explosion of dynamite then on a car in defendant's yard. The evidence showed that the dynamite exploded, and injured the property of plaintiff. It was held that the burden was on plaintiff to show that the place where stored was an improper place.

The case of *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. Rep. 1020, 29 Lawy. Rep. Ann. 718, was for the recovery of damages resulting from an explosion of dynamite and nitroglycerin stored in a magazine. The complaint averred negligence, and upon the issue thus made the trial was had. There was expert evidence tending to show that by the exercise of proper precaution an explosion could be avoided. An important rule laid down by the court is that proof of the explosion raises *prima facie* a presumption of negligence, and places the burden upon the defendant to overcome it. There are many citations in the notes to the report of the case in Lawy. Rep. Ann. *supra*.

In the case of *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, the defendant was indicted for a nuisance for keeping 50 barrels of gunpowder near the dwelling houses of divers good citizens, and near a certain public street in the city of Brooklyn, etc. The indictment was held bad, for the reason that it failed to charge that the gunpowder was negligently or improvidently kept. All the authorities which have referred to this case expressly or impliedly concede that it decides that the keeping of gunpowder in large quantities in a public place in a city is not a nuisance *per se*. The West Virginia case cited above says it was overruled by later New York cases. We have been unable to find the cases overruling it. The Tennessee case, *supra*, criticises the opinion of Chief Jus-

tice Kent, holding that the indictment was bad. In referring to the case decided by Holt, C. J., while stating that it had been loosely reported, Chief Justice Kent first quoted the principles decided, and then used the following language: "This case, as far as it is any authority, goes in confirmation of the principle that the time, place, and manner are all important and essential in determining whether a powder house amounts to a nuisance."

The case of *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744, has been cited as not sustaining the case of *People v. Sands*, 1 Johns. 78, *supra*. Our reading of the case is different. We think it not only approves of the principles announced, but cites it as authority. In the case of *Myers v. Malcolm* the action was for damages resulting from an explosion of 600 pounds of powder in kegs in the upper story of a wooden building, near several wooden buildings, some of which were inhabited. On the trial it was left to the jury to determine "whether the conduct of the defendants in regard to the manner of depositing the powder was such as to render them guilty of a public nuisance." And, further commenting, it was the opinion of the court that, "the most satisfactory position for the plaintiff, and the one most difficult to be answered by the defendants, is the ground that the depositing and keeping of the powder in the *exposed situation* (we italicize) described by the witnesses amounted to a public nuisance." Says the court: "Upon the facts disclosed in this case, it cannot be doubted that the gunpowder was deposited in a building insufficiently secured and protected, and altogether unfit for the safe keeping of so large a quantity of the article." This opinion certainly gives no support to the position that the storing of gunpowder in a public place is *per se* a public nuisance. The case is directly in support of the principle that the "time, place, and manner," are important and essential in determining whether a powder house amounts to a nuisance, and accords with the rule declared in *Heeg v. Licht*, 80 N. Y. *supra*.

The case of *Bradley v. People*, 56 Barb. 72, referred to in some of the decisions as supporting the proposition that the keeping of gunpowder in large quantities in populous places is a nuisance *per se*, to our understanding of the decision is an authority to the contrary. This decision not only cites *People v. Sands*, *supra*, and *Myers v. Malcolm*, *supra*, as authority, but the decision itself is rested upon these two cases. Says the court: "The careless and improper manner of building and continuing the powder house and keeping the powder therein are fully charged," and that was the real issue tried. This case was reversed, because the trial court admitted testimony for the prosecution to show in what manner the government magazines were constructed. In commenting on this testimony the court used the following language: "And if it was intended to show that it was the duty of the defendants to build theirs in the same way, it was incompetent, for to hold that all dealers in gunpowder who have occasion to keep it in quantities are bound to construct their store houses for that purpose in the same way that it is deemed necessary in forts and arsenals would virtually interdict the traffic in the article by private persons, who could not afford the expense necessary to comply with any such requirement. With the selection of a suitable location I think a much less expensive warehouse would be sufficient. The court below doubtless admitted the testimony because it was thought to be material, and that it would aid the jury in determining the ques-

tion of negligence on the part of the defendants; and it may have had that effect. At all events, I cannot see that it did not affect the result."

It seems clear that in New York the case of *People v. Sands* is adhered to as sound law.

In the case of *Reg. v. Lister* (decided in 1857), Dears. & B. Cr. Cas. 209, the question is discussed at some length. The defendant was indicted for a public nuisance. The indictment charged that the defendant "unlawfully, knowingly, and willfully, did deposit in a warehouse near to divers streets and highways and dwelling houses, etc., large and excessive quantities of a dangerous ignitable and explosive fluid, called 'wood naphtha,' . . . and did keep the said fluid in such large, excessive, and dangerous quantities, whereby the queen's subjects passing along the said streets and highways and residing in said dwelling houses were in great danger of their lives and property," etc. This indictment was held good. It was shown that wood naphtha was more dangerous and explosive than gunpowder. This case more directly supports the proposition that the keeping of gunpowder in large quantities in a populous place is a nuisance *per se* than any other English authority we have been able to find. The court used the following language: "Upon the trial of such indictments we consider that it is a question of fact for the jury whether the keeping and depositing or the manufacturing of such substances really does create danger to life and property as alleged; and this must be a question of degree, depending on the circumstances of each particular case. No general rule of law can be laid down beyond this: that the substantial allegations in the indictment must be substantially proved. In the present case we think that sufficient, although not necessarily conclusive, evidence was adduced, and that, although the judge would not have been justified in directing a verdict of guilty to be entered without taking the opinion of the jury upon it, he was fully justified in telling the jury (which he appears to have done) that if the depositing and keeping the naphtha in the manner described, coupled with its liability to ignition, *ab extra*, created a danger to life and property to the degree alleged, they might find a verdict of guilty." The predominant principle declared in the opinion is that "the substance must be of such a nature, and kept in such large quantities and under such local circumstances, as to create real danger to life and property."

In the older edition of Russell, Crimes, § 321, the following language is used: "*It seems* (we italicize) that erecting gunpowder mills or keeping gunpowder magazines near a town is a nuisance by the common law, for which an indictment or information will lie." In the International Edition of Russell on Crimes, the phraseology is changed, and the author is made to say: "Erecting gunpowder mills or keeping gunpowder magazines near a town is a nuisance by the common law, for which an indictment or information will lie." We are of opinion that the author himself knew and weighed the effect of words, and used those which conveyed his exact meaning. An examination of the cases cited to the text shows that the principle was recognized that trades which were necessary and lawful of themselves were not to be interfered with by indictment or information, unless they come within the definition of a public nuisance. Dealing in gunpowder was a lawful business. Being a lawful business, the question was whether the keeping of gunpowder in populous places, or near highways was an indictable offense under any circumstances. One of the earliest cases re-

ported was that of *Rex v. Taylor*, 2 Strange, 1167, where, "upon affidavits of the defendant keeping great quantities of gunpowder to the endangering the church and houses where he lived, an information was granted." This is the entire report of the case. What the evidence showed, or the result of the case, is not reported. The affidavit was the keeping of the gunpowder to the endangering of the church and houses. No doubt the information was properly granted, and if the proof showed it was so kept as to endanger "the church and houses" it was a nuisance. Another case was that of *Rex v. Williams*, in which the defendant was convicted of a nuisance for keeping 400 barrels of gunpowder near the town of Bradford. How this powder was kept is not stated. Upon these cases, for they are the cases cited to support the text, Russell, *supra*, announced the proposition: "It seems that erecting gunpowder mills or keeping magazines near a town is a nuisance at common law;" and this view of the principle is emphasized in the case of *Crowder v. Tinkler*, 19 Ves. 616. In the latter case an injunction was prayed for. The court ascertained from an *ex parte* investigation that the defendant might keep as much as 1,200 pounds safely, for the demands of trade, and made an order allowing this quantity to be kept until a trial could be had by a jury. It is important to notice the real issue he submitted to the jury. It was not merely whether the defendant manufactured or stored large quantities of gunpowder in the place where it was charged to have been done, upon which the court would pronounce as a conclusion of law that such use would be a nuisance *per se*; but the jury were required to determine the question of danger. And in the case of *Reg. v. Lister*, Dears. & B. Cr. Cas., *supra*, the direct question arose as to whether the finding of the jury should be limited merely to the keeping of the explosive as charged, or should further find that such keeping was dangerous; and it was held that under proper instructions it devolved upon the jury to determine not only the fact of keeping the explosive, but whether the facts showed such keeping was dangerous to property or life. These cases are in line with the rule declared in New York and in other courts; and that is that when gunpowder is so manufactured or stored as to endanger life or property, such use is a nuisance. Whether it is so or not is a question of fact, dependent upon the "place, manner, and surrounding circumstances," to be ascertained by the jury. In *Whart. Cr. Law*, § 2376, it is said: "The mere keeping of a large quantity of gunpowder in a house, near dwelling houses and a public street, does not constitute a nuisance; but keeping it negligently and imprudently does." In *Wood*, Nuis. § 140, it is said: "In determining the question the locality, the quantity, and the manner of keeping will all be considered, as well as the nature of the explosive, and its liability to accidental explosion," and, as supporting the general principle, the cases of *People v. Sands*, 1 Johns., *supra*, *Myers v. Malcolm*, 6 Hill, *supra*, and *Heeg v. Licht*, *supra*, are cited as authorities.

The question came before the court in the case of *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 700, upon a bill filed to abate the keeping of a powder house in which large quantities of powder were kept. The answer of respondents averred that "their magazine is well constructed, and is protected against accidents by secure fencing, lightning rods, and by the constant presence of a trusty man; that it stands in a sparsely settled neighborhood," etc. These statements were proven. The evidence was conflicting as to the effects of an explosion. The question upon

which the case was determined was whether the keeping of the powder house in which large quantities of powder were stored was a nuisance *per se*. Referring to the opinion of Chief Justice Kent in the case of *People v. Sands*, *supra*, the court declared that "the point had been conclusively settled by very high judicial authority." The further statement is made "that the only adjudged case we have met with in which the principle seems to have been differently settled is that of *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734, *supra*," and it declared that "the principles and reasoning upon which the decision rests are opposed to the unbroken current of modern authority, English and American, upon the subject."

In the case of *Wright v. Railway Co.*, 27 Ill. App. 200, after discussing the liability of parties for damages resulting from keeping explosive materials, the court uses the following language: "We are content with the rule that the keeping of explosives unsafely guarded in such quantities as to be dangerous to persons and property, near a frequented street or other public place, or in the vicinity of the residences or places of business of others, under circumstances that threaten calamity to the person or property of others, the consequences thereof being an explosion of such articles, which causes damage to the person or property of another, gives the latter a right of action to recover from the person keeping the explosive such damages as would not have happened in their absence;" citing *Myers v. Malcolm*, 6 Hill, *supra*, and *Cooley*, Torts, 607.

In the case of *Cook v. Anderson*, 85 Ala. 99, 4 South. Rep. 713, the court used the following language: "Keeping explosive substances in large quantities in the vicinity of dwelling houses or places of business is ordinarily regarded a nuisance, whether so or not being dependent upon the locality, the quantity, and the surrounding circumstances." What was dependent "upon the locality, the quantity, and the surrounding circumstances?" There is but one answer, and that is whether "the keeping of explosive substances in large quantities in the vicinity of dwelling houses or places of business" was a nuisance. Again, the terms, "the locality, the quantity, and the surrounding circumstances," are identical with those used in *Heeg v. Licht*, 80 N. Y. 579, *supra*, and no doubt were taken from it or from *Wood*, Nuis. § 140, and used in the same sense.

This question came before us again in the case of *Collins v. Railroad Co.*, 104 Ala. 390, 16 South. Rep. 140, where the principle is stated as follows: "The fact that defendant had in its warehouse 1,200 pounds of powder is not of itself such evidence of negligence as entitles the plaintiff to recover. While it may be said that the keeping of large quantities of explosive material in a building in a populous town or city may be a nuisance, yet the fact that it is such or not must depend on the locality, quantity of material stored, and the circumstances. Negligence in keeping it, or in the manner of its keeping, is requisite to impose a liability to answer in damages for injuries caused by an accidental explosion or fire."

After a most careful examination of the common law text-books and decisions, we have no doubt of the correctness of our conclusion in the foregoing cases, and which exactly accords with the law as declared in *People v. Sands*, *supra*. Steam power, gas, electricity, dynamite, gunpowder are in daily use, and have become indispensable to the convenience of the public, and for the public defense. Invention of man and advancement in science have enabled the manufacturer of or dealer in these articles to provide the

public or the individual with almost, if not altogether, absolute protection against danger or hurt from explosion. And, even had the manufacturing and storage of gunpowder, in its early history, been a nuisance at common law, the common law definition of a nuisance would not include gunpowder at this day.

MANDAMUS AGAINST CORPORATIONS TO COMPEL DUTIES TO INDIVIDUALS.

§ 1. *Mandamus lies to Compel Corporations to Perform Services Owing by them to Individuals.*—A great multitude of cases, including those hereafter cited, unite in holding that where a corporation undertakes to perform a public service to individual members of the public or to corporations distributively, whether such undertaking is assumed by accepting a charter which commands the performance in express terms, or by accepting a charter or license which permits the performance of the service, from which circumstances an obligation to perform it is implied, such corporation can be compelled by *mandamus*, at the suit of the interested private person, to perform the service.¹

¹ Haugen v. Albina Light, etc. Co., 21 Oreg. 411, 423; State v. Delaware, etc., R. Co., 48 N. J. L. 55; State v. New Haven, etc. Co., 37 Conn. 153; State v. Nebraska Teleph. Co., 17 Neb. 126; State v. Republican Valley R. Co., 17 Neb. 647; American Waterworks Co. v. State, 46 Neb. 194, 30 L. R. A. 447, 12 Am. R. & Corp. Rep. 88, 64 N. W. Rep. 711; Chicago, etc. R. Co. v. People, 56 Ill. 365. Mandatory injunctions have been used to a limited extent for the same purposes as those expressed in the preceding paragraph. In one case, a contract between a railroad company and an express company, by which the railroad undertook to give the latter company an exclusive privilege of doing business upon its line, was cancelled in equity at the suit of a partner in another express company, who was also a stockholder in the railroad company and who brought his suit in that character to restrain the railroad company from discriminating in favor of a rival express company. *Sanford v. Railroad Company*, 24 Pa. St. 378. Another court has held that a mandatory injunction will not be granted on motion and preliminary to the final hearing on bill and answer, to a railway carrier to compel it to transport goods at the rate fixed by law; but that an injunction will issue to prevent a railway company, bound by law to transport goods, from entering into an agreement not to transport them at the rates fixed by law. *Rogers Locomotive, etc. Works v. Erie R. Co.*, 20 N. J. Eq. 379, where the scope of mandatory injunctions is discussed. In another case, where the owner of a warehouse had, both by statute and under the principles of the common law, a right to have grain, consigned to his warehouse delivered there and not at some other warehouse, and delivered at the same rate of charges paid by the

§ 2. *Mandamus lies to Compel Corporations to Perform Public Services in the Performance of which Individuals have a Special Interest.*—There is also a good deal of judicial authority in favor of the proposition that a *mandamus* will lie, at the suit of private relators, to compel private or quasi-public corporations to perform strictly public services in the performance of which such relators have a special interest; such as compelling a canal company to build a bridge over its canal to restore the public highway, which its canal has interrupted,² or compelling a railroad company to establish a depot and a regular service at a particular place, although there is no express statute requiring it so to do;³ or even to compel a borough to perform the common law duty of repairing a highway within its limits;⁴ or at the suit of a municipal corporation, to compel a street railway company to pave certain portions of the streets occupied by its tracks;⁵ or, at the suit of a railway corporation, to compel a county to subscribe for railway bonds in compliance with a statute giving it the power so to do.⁶

owners of another warehouse at the same place, the conditions being equal, an injunction was allowed to restrain the railroad company from delivering to any other place than that of the consignee, and from imposing an additional charge for such delivery. *Vincent v. Chicago, etc. R. Co.*, 49 Ill. 33. While the doctrine obtained in the circuit courts of the United States, and before the Supreme Court of the United States had decided otherwise (*Express Cases*, 117 U. S. 1), that a railway company could be compelled to furnish facilities to an express company, the writ of injunction was frequently used to compel them to furnish such facilities, or negatively, to restrain them from denying such facilities. *Wells v. Oregon, etc. R. Co.*, 15 Fed. Rep. 561, 8 Sawyer (U. S.), 611; *Wells v. Northern Pacific R. Co.*, 23 Fed. Rep. 469. That a mandatory injunction will not be granted where there is a plain remedy by *mandamus*, was held in *Walkley v. Muscatine*, 6 Wall. (U. S.) 481. That a mandatory injunction may be granted to compel a railroad company to perform the statutory duty of receiving freight and express from a connecting road, see *Chicago, etc. R. Co. v. Burlington, etc. R. Co.*, 34 Fed. Rep. 481.

² *Trenton Water Power Co.*, 20 N. J. L. 659.

³ *State v. Republican Valley R. Co.*, 17 Neb. 647.

⁴ *Uniontown v. Com.*, 34 Pa. St. 293.

⁵ *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

⁶ *Napa Valley R. Co. v. Napa County*, 30 Cal. 435.

Where the object, the doing of which is sought to be compelled, is a public object, *mandamus* may properly be used at the suit of the State, through its attorney—as to compel a railroad company to resume the operation of a line of its road connecting with a line of steamboats, which it had formerly operated, but which it had discontinued to the public detriment. *State v. Hartford, etc. R. Co.*, 29 Conn. 538. Or to compel a railroad company to stop all its regular

§ 3. *Not Necessary that the Obligation should have been Created by Statute.* — Although a *mandamus* will be more readily granted to compel the performance of a specific duty, which is clearly required to be performed by the statutory law, yet it is not at all necessary to the beneficial exercise of this jurisdiction, that the obligation sought to be performed should have been created by statute; it will be sufficient if it clearly arises under the principles of the common law.⁷ For example: A *mandamus* has been granted, even at the suit of a private person, to compel a borough in Pennsylvania to keep in repair a highway within its limits, the duty to repair arising under the principles of the common law.⁸ It has also been awarded to compel a railroad company, which was held to be bound under the principles of the common law, to furnish reasonable facilities for shippers to maintain a depot and a regular service thereat, at a particular place where it was clearly shown that such accommodations were necessary, although there was no express statute requiring the company so to do.⁹ So a canal company, which, in the construction of its canal, interrupted the public highway, was compelled by *mandamus* to restore the same, although neither its charter nor governing statute contained any express mandate that it should do so.¹⁰

§ 4. *The Fact that the Corporation thus Compelled is a Foreign Corporation, makes no Difference.* — Foreign corporations are subject, in respect to their business done within the domestic State, to domestic regulations, and can be compelled by *mandamus*

passenger trains at a particular station in a town which is a county seat, in compliance with a statute. *Illinois Central R. Co. v. People*, 143 Ill. 434. There is a large class of cases presenting this use of the writ, but they lie outside the scope of this article. For a noteworthy case of this kind, where this use of the writ at the suit of private relators was affirmed, see *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 355, citing other cases; affirming s. c., 3 Dill. (U. S.) 515.

⁷ *People v. Chicago, etc. R. Co.*, 130 Ill. 175; *State v. Republican Valley R. Co.*, 17 Neb. 647; *State v. Nebraska Teleph. Co.*, 17 Neb. 126; *In re Trenton Water Power Co.*, 20 N. J. L. 659, 653; *Uniontown v. Com.*, 24 Pa. St. 293.

⁸ *Uniontown v. Com.*, 34 Pa. St. 293.

⁹ *State v. Republican Valley R. Co.*, 17 Neb. 647; *People v. Chicago, etc. R. Co.*, 130 Ill. 195. One court, however, denied the right to relief in such a case, on the ground that the matter rested in the discretion of the directors. *People v. New York, etc. R. Co.*, 104 N. Y. 53, 58 Am. Rep. 484.

¹⁰ *In re Trenton Water Power Co.*, 20 N. J. L. 659.

to carry on that business, and in so doing to serve all persons equally under like conditions, the same as domestic corporations may be so compelled.¹¹

§ 5. *Mandamus Lies to Compel Gaslight Companies to Furnish Gas to Private Consumers.* — Entering now upon the field of illustration, we find that a gaslight company may be compelled by *mandamus* to supply its gas to persons who, under its charter, have the right to be supplied with it, and who have complied with the general conditions upon which the company supplies its other customers in the same city. In so holding the court said: "They possess, by virtue of their charter, powers and privileges which others can not exercise; the statutory duty is imposed upon them to furnish gas on payment of all moneys due by such applicants."¹² It is true that one court held that a gaslight company, incorporated to supply gas to the city and to its inhabitants, but with no special privileges except that of recovering double damages for injuries to its pipes, and having no right to lay its pipes through public or private land without first obtaining permission therefor from the owners, was under no legal duty to supply gas to a particular person, since it stood on the footing of a merely private manufacturing corporation, and, consequently, owed no duty to furnish its manufactured product to any particular person.¹³ This case was decided by the Supreme Court of New Jersey, two judges sitting. The doctrine announced in it was subsequently denied by a higher court of the same State, the Court of Appeals, and the case was in effect overruled.¹⁴ And it was pointedly denied in a very able judgment in another State.¹⁵ The better and sounder doctrine undoubtedly is, that where a private corporation, organized for the purpose of carrying on a business, public in its nature,—such as furnishing water or gas to the inhabitants of a city, accepts from the city or from the State its franchises and a grant of the right of eminent domain, without which its business could not be carried

¹¹ *Central Union Teleph. Co. v. State*, 118 Ind. 194, 207; *Central Union Teleph. Co. v. State*, 123 Ind. 113.

¹² *People v. Manhattan Gaslight Co.*, 45 Barb. (N. Y.) 136.

¹³ *Patterson Gaslight Co. v. Brady*, 27 N. J. L. 245.

¹⁴ *Olmstead v. Proprietors*, 47 N. J. L. 333.

¹⁵ *Haugen v. Albina Light etc. Co.*, 21 Oreg. 411.

on, it accepts such grant on the implied condition that it will perform the duty for which it is organized, that of furnishing water or gas on reasonable terms to any inhabitant of the city applying therefor, and showing his capacity to receive the same and tendering compliance with such reasonable terms as the corporation may exact for furnishing the same; and that if, under such circumstances, the corporation refuses to furnish the water or the gas to such inhabitant, it may be compelled to do so by *mandamus*, although the grant of the franchise may not in express terms require it so to do.¹⁶

§ 6. *To Compel Water Supply Companies to Furnish Water to Private Consumers.*—So a private corporation which procures from a city or from the State, a franchise to supply the city and its inhabitants with water, and which, by virtue of its franchise, is permitted to use the streets and alleys of the city in laying its mains and pipes, becomes thereby charged with the public duty of supplying at reasonable rates, all the inhabitants of the city, and of charging each inhabitant for the water it supplies to him no more than the same price which it charges to every other inhabitant for the like service under the like conditions; and this duty may be enforced by *mandamus*.¹⁷ In California an irrigation company was chartered with power, among other things, to furnish, sell, give and supply water to any person or corporation, for irrigation or other purposes. As in the preceding cases it possessed the power of eminent domain, but it did not appear whether or not it had ever exercised it. It was held that it was a corporation organized for a public object; that the power conferred upon it for this public object carried with it a correlative duty to supply water to any one who might apply therefor, so long as it had the power to do so; and that this duty was properly en-

forced by *mandamus*.¹⁸ In Oregon, substantially the same doctrine is laid down with reference to a corporation organized to supply water to a city. The court laid stress on the fact that its franchise to dig up the public streets is a privilege which concerns the public to such an extent that the State or city may make it exclusive.¹⁹ But the court proceeded upon the broader doctrine that a corporation, undertaking by its acceptance of a public franchise to perform a certain service to the members of the community distributively, can, by *mandamus*, be compelled to perform that service.²⁰ So, an irrigation company, created in Colorado, to supply water to consumers, must supply those who are so situated as to receive the same, provided it has water undisposed of, upon reasonable terms; and this right will be enforced by *mandamus*.²¹ In the opinion of the court in the earlier case, Helm, J., said: "Where a statute is absolutely silent as to the amount of the charge for transportation, and the time and the manner of its collection, there will be legal ground for the position that a demand in this respect must be reasonable. The carrier (meaning the irrigation company), voluntarily engages in the enterprise; it has in most instances, from the nature of things, a monopoly of the business along the line of its canal; its vocation, together with the use of its property, are closely allied to the public interest; it is, I think, charged with what the decisions term, a public trust or duty. In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable, judicial control, invoked and exercised for the common good, in the matter of regulations and charges; and an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands would lay the foundation for judicial interference."²²

§ 7. *To Compel Telephone Companies to Serve Particular Persons.*—In like manner a

¹⁶ *Haugen v. Albina Light etc. Co.*, 21 Oreg. 411. That such a grant and such acceptance carry with them the implied duty to serve with the particular commodity any inhabitant applying for it, and able to receive it and pay for it on the same terms that are exacted of others, although this duty is not expressly imposed in the terms of the grant, see *Olmstead v. Proprietors*, 47 N. J. L. 311.

¹⁷ *American Waterworks Co. v. State*, 46 Neb. 194, 39 L. R. A. 447, 12 Am. R. & Corp. Rep. 68, 64 N. W. Rep. 711; *State v. Joplin Water Works*, 52 Mo. App. 312; *Haugen v. Albina Light, etc. Co.*, 21 Oreg. 411, 14 L. R. A. 424; *People v. Green Island Water Co.*, 56 Hun (N. Y.), 76.

¹⁸ *Price v. Riverside etc. Co.*, 56 Cal. 431.

¹⁹ As was held in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; and in *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683.

²⁰ *Haugen v. Albina Light etc. Co.*, 21 Oreg. 411.

²¹ *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146.

²² *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582.

corporation owning and conducting a system of public telephone exchanges, supplying with that service a large number of customers on terms fixed by itself, has been held to be engaged in an employment of a public nature, in such a sense that it is bound to serve all persons applying for its service and tendering the proper compensation, without discrimination, under like conditions. The reasoning of the court, in its opinion delivered by Reese, J., well illustrates the adaptability of the principles of the common law to new situations: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned. It is, to all intents and purpose, a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibility of a common carrier of news. Its wires and poles lie in our public streets and thoroughfares. It is, and must be held to have taken its place by the side of the telegraph as such common carrier. The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike, who are like situated, and not discriminate in favor of, nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other servants of the public, do not apply to the telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to instrumentalities of commerce, nor to the particular kinds of service known or in use at the time when those principles were enunciated, 'but they keep pace with the prog-

ress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach; from the sailing vessel to the steamboat; from the coach to the steamboat and the railroad; from the railroad to the telegraph; and from the telegraph to the telephone; 'as these new agencies are successively brought into use to meet the successive demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances.'" And the court held that *mandamus* was the proper remedy to enforce the duty assumed by a telephone company of furnishing its service to an inhabitant of a particular city in which it did business.²³ The same doctrine was affirmed in the Supreme Court of Indiana, in a case where a foreign corporation operating a system of public telephones in one of the towns of that State, was held to be a common carrier of news, and, as such, subject to public regulation. The court said: "It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph; and by reason of being a common carrier it is subject to proper obligations and to conduct its business in a manner conducive to the public benefit, and to be controlled by law." And the court also said: "Any person or corporation engaged in telephonic business, operating telephone lines, furnishing telephonic communications, facilities and service to business houses, persons and companies, and discriminating against any person or company, can be compelled by a mandate [*mandamus*], on the petition of such person or company discriminated against, to furnish the petitioner a like service as furnished to the others." And the court held, under a statute, that a public telephone company created under the laws of a foreign State, and doing business in the State of Indiana, and in a particular city of that State, was bound to furnish a person doing business in that city with an instrument and the facilities of a public telephonic exchange in his place of business in that city, although it ap-

²³ State v. Nebraska Telephone Co., 17 Neb. 126, 134, 135. The extracts and inside quotation points are from the opinion in Pensacola Teleph. Co. v. Western Union Tel. Co., 96 U. S. 9.

peared that the telephone company was going out of business in that city as the furnisher of such exchange facilities, and was only keeping them up until its existing contracts with particular customers should expire, and intended thereafter to do only such business as could be done by means of public telephone stations.²⁴

§ 8. *To Admit a Qualified Person to Membership in an Incorporated Medical Society.*—The writ of *mandamus* has also been held a proper remedy by one of the most authoritative courts in the country, to compel an incorporated medical society to admit to its membership one qualified under its by-laws to become a member thereof.²⁵ It does not appear from the report of this case that the society was anything more than an incorporated private society; but from an earlier case it appears that there was a public statute which entitled the relator to be admitted to its membership.²⁶

§ 9. *To Compel Corporations to Perform Public Duties to Individuals Without Discrimination.*—A charter power to perform, for private gain, duties affected with a pub-

²⁴ Central Union Teleph. Co. v. State, 118 Ind. 194, 206, 207. The doctrine of this case was reaffirmed in Central Union Teleph. Co. v. State, 123 Ind. 113. The doctrine that a writ of *mandamus* is the proper remedy to compel telephone companies to furnish equal facilities to all persons and corporations under like conditions has been asserted in many other cases both under statutes and at common law. Central Union Teleph. Co. v. Bradbury, 106 Ind. 1; Bell Teleph. Co., v. Com. (Pa.), 3 Atl. Rep. 825; State v. Delaware, etc. Tel. Co., 47 Fed. Rep. 633; State v. Bell Teleph. Co. St. Louis Cir. Ct., Judge Thayer, 22 Alb. L. J. 663, 44 Am. Rep. 241, note, 10 Cent. L. J. 437; Chesapeake, etc. Teleph. Co. v. Baltimore, etc. Tel. Co., 66 Md. 399. State v. Bell Teleph. Co., 23 Fed. Rep. 539. See also Hockett v. State, 105 Ind. 250; and compare American Rapid Tel. Co. v. Connecticut Teleph. Co., 49 Conn. 352, 44 Am. Rep. 237; Commercial Tel. Co. v. New England Teleph. Co., 61 Vt. 241, 5 L. R. A. 161. So, under a statute which required telegraph companies to transmit dispatches with impartiality and in good faith, in connection with another statute extending the provisions of a former statute to telephone companies. State v. Telephone Co., 36 Ohio St. 296, 309.

²⁵ People v. Medical Society, 32 N. Y. 187; affirming 25 How. Prac. (N. Y.) 333. But it was held that such relief would not be granted where the *status* of the relator was such that if admitted to membership he would have been liable to immediate expulsion from the society. *Ex parte Paine*, 1 Hill (N. Y.), 665.

²⁶ *Ex parte Paine*, *supra*. *Mandamus* is also the ancient remedy to restore an officer of a corporation unlawfully removed. 1 Thomp. Corp. § 829, *et seq.* Or to restore a member of an incorporated society unlawfully expelled. 1 Thomp. Corp. § 905, *et seq.*; People v. Medical Society, 24 Barb. (N. Y.) 570.

lic interest, compels the performance of those duties without partiality or discrimination, and all engagements not to do so are void. This proposition has been judicially enforced, with and without the aid of statutes, in many situations. Thus, an agreement by a railway company to carry goods for certain persons at a cheaper rate than they are carrying under the same conditions for other persons, is void as creating an illegal preference.²⁷ The State cannot be supposed to have granted such a franchise to enable the grantee to destroy one person and build up another.²⁸ So, in England a contract which admitted to the door of a railway station, within the company's yard, a certain omnibus and excluded others, was held to be a breach of a statutory prohibition against the granting of undue and unreasonable preferences, and was hence void.²⁹ So, a power given to a railway company by its charter to regulate the transportation of goods over its road, did not give it the right to grant exclusive privileges to a particular express company. The court said: "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another; and make even religion and politics the tests in the distribution of its favors. * * * The rights of the people are not subject to any such corporate control."³⁰ So it has been reasoned that railroad companies are common carriers, and as such, owe duties to the public from which they cannot release themselves except with the consent of every person who may call upon them to perform such duties. Among these duties is the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. Hence where a railway company set up, as a defense to a proceeding by *mandamus* to compel it to deliver to the elevator or grain warehouse of the relator, whatever grain in bulk might be consigned to such elevator, that said company had entered

²⁷ Messenger v. Pennsylvania R. R. Co., 36 N. J. L. 407.

²⁸ See also State v. Republican Valley R. Co., 17 Neb. 647, 659, where the same doctrine is strongly enforced.

²⁹ Marriott v. London, etc. R. Co., 1 Com. Bench N. S., 499, 87 Eng. Com. Law, 498.

³⁰ Sanford v. Railroad Co., 24 Pa. St. 378, 383.

into contracts with the owners of certain other elevators at the same point for the exclusive delivery to the latter, to the extent of their capacity, of all such grain in bulk as the company should receive at that point, it was held that said contracts could have no effect when set up as against a person not a party to them, as an excuse for not performing toward such person, those duties of a common carrier which are prescribed by law.³¹ So, a railroad company was held bound to deliver grain at the warehouse of the plaintiff, the same being on its line, and at a rate not higher than that charged to others for the like service.³² So, it has been held that, although a railroad company chartered as a carrier of passengers and freight, is under no obligation to establish commutation rates for a particular locality,—yet, if it has established such rates, and if commutation tickets are sold by it at such rates to the public generally, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him, and in violation of the principles of equality which the common carrier is bound to observe in the conduct of its business; and that for such an illegal refusal, the remedy is by *mandamus*.³³ So, a *mandamus* has been awarded at the relation of a private person, to compel a railroad company to establish a depot and to maintain a regular service in connection with the same at a particular place on its line, on proof that a depot at said place was necessary for the public accommodation, and particularly for the accommodation of the relator, and for the proper discharge by the railroad company of its duties towards the public as a common carrier, possessing important franchises received from the State,—although there was no statute requiring it to establish a depot at that place.³⁴ So, where a municipal corporation

has, by ordinance, granted a license or franchise to a street railroad company to construct and operate a street railroad on a certain route within the city, the railroad corporation can be compelled by *mandamus*, at the suit of the city, to operate it, after having constructed it, and this although neither the charter of the railroad corporation nor the city ordinance in terms requires it so to operate it. The making on the one part and the accepting on the other of the grant of the license or franchise implies an obligation on the part of the grantee to operate the road which it is so licensed to build and operate, which obligation is enforceable by *mandamus*.³⁵

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See also *Railroad Commissioners v. Portland etc. R. Co.*, 63 Me. 269, where similar relief was granted under similar circumstances in a proceeding instituted by the railroad commissioners, under a statute, at the request of interested individuals. *Contra*, *People v. New York etc. R. Co.*, 104 N. Y. 58.

³⁵ *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312.

BILLS AND NOTES—CORPORATION—SIGNING BY OFFICERS—PERSONAL LIABILITY.

ALBANY FURNITURE COMPANY v. MERCHANTS' NATIONAL BANK.

Appellate Court of Indiana, May 19, 1897.

1. Where a complaint alleges that the defendant company, and S and Z, by their joint note, promised to pay, and make the note part of the complaint, reciting "we promise to pay," and signed "Albany Furniture Co., Stafford, Pres., and Zapf, Man.," a good cause of action is stated against the president and manager as individuals.

2. The court cites many cases where the officers, and not the corporation, were held responsible, by reason of the peculiar signature.

ROBINSON, J.: Appellee sued appellants upon the following instrument: "Chicago, Ill., Aug. 15, 1894. One hundred and eighty days after date, for value received, we promise to pay, at the office of Frank T. Gilpin, Muncie, Indiana, to the order of E. A. Shanklin & Co., the sum of one hundred and fifty and no-100 dollars, with interest at the rate of—per cent. per annum, payable annually, and attorney's fees. The makers and indorsers of this note hereby severally waive presentment for payment, protest, and non-payment, and also waive relief from all valuation and appraisement laws. (Signed) Albany Furniture Co. Jas. E. Stafford, Pres., J. Zapf, Man." The note was indorsed, "E. A. Shanklin & Co., per Frank T. Gilpin." The

³¹ *Chicago etc. R. Co. v. People*, 56 Ill. 365.

³² *Vincent v. Chicago etc. R. Co.*, 49 Ill. 33; *Compare People v. Chicago etc. R. Co.*, 55 Ill. 95, where it was held, by a divided court, that a railroad company could not be compelled to receive grain to deliver at an elevator on a side or spur track beyond its terminus.

³³ *State v. Deleware etc. R. Co.*, 48 N. J. L. 55.

³⁴ *State v. Republican Valley R. Co.*, 17 Neb. 647. So held in *People v. Chicago etc. R. Co.*, 130 Ill. 175.

complaint alleges: "The plaintiff complains of the defendants and alleges that on the 15th day of August, 1894, the defendants, the Albany Furniture Company, James E. Stafford, and Jacob Zapf, by their joint promissory note, a copy of which is filed herewith, marked 'Exhibit A,' and made a part of this complaint, promised to pay to the order of," etc., etc. The summons issued directed the sheriff to summon "The Albany Furniture Company, James E. Stafford, Jacob Zapf, E. A. Shanklin & Co., and Frank T. Gilpin." The summons was served on Stafford and Gilpin by reading, on the furniture company "by reading the same to and in the hearing of James E. Stafford, president of said company, and by giving him a true copy of this writ," and on Jacob Zapf by leaving a copy at his residence. None of the defendants appeared, and judgment was rendered in appellee's favor on default. Without objection to the proceedings in the trial court, appellants question the sufficiency of the complaint. The error assigned is that the complaint does not state facts sufficient to constitute a cause of action, and it cannot be available for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint. *Laverty v. State*, 109 Ind. 217, 9 N. E. Rep. 774; *Assurance Co. v. Koontz* (Ind. App.), 46 N. E. Rep. 95.

The judgment having been taken by default, we cannot assume that anything was proved beyond what is alleged in the complaint; so that the sufficiency of the complaint comes before us exactly as if there had been an unsuccessful demurrer in the court below. *Old v. Mohler*, 122 Ind. 594, 23 N. E. Rep. 967; *Albany Furniture Co. v. Merchants' Nat. Bank* (Ind. App.), 46 N. E. Rep. 479. The failure of the appellants to demur or answer the complaint was a confession that the complaint was true as to the facts stated. *Fisk v. Baker*, 47 Ind. 534. It is alleged in the complaint that the note sued on is the joint promissory note of the furniture company, Stafford and Zapf, and we must assume that that fact was proven. The case of *Albany Furniture Co. v. Merchants' Nat. Bank* (Ind. App.), 46 N. E. Rep. 479, cited by counsel for appellee, is not controlling in this case, for the reason that the complaint in that case was essentially different from the complaint in the case at bar. In *Means v. Swormstedt*, 32 Ind. 87, the note read: "We promise to pay," etc., and was signed, "Wm. B. Swormstedt, Secy." On the lower left-hand corner of the note was an impression of a seal, embossed upon the paper of the note, bearing the words, "Neal Manufacturing Co., Madison, Ind." In holding this to be the note of the corporation only, the court said: "The seal of the company is in the hands of the secretary. It is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affixed the seal of the corporation, which, containing upon its face the

proper designation of the corporation, was a signing of their name." In the case of *Pearse v. Welborn*, 42 Ind. 331, "the makers of the note not only added to their names letters which indicated the offices they held, and the characters in which they acted, but in the body of the note the promise is made by them as master wardens and trustees of said lodge." In *Armstrong v. Kirkpatrick*, 79 Ind. 527, the note on its face says that it is the note of the Howard County Agricultural Association, and that it executes the note by the directors of the association. In that case the note was held to be the note of the association. In the case of *Mears v. Graham*, 8 Blackf. 144, the note was: "331.15. Ten days after date, we, the trustees of the Methodist E. Church in Rockport, promise to pay to the order of I. and J. Mears three hundred and thirty-three dollars and fifteen cents, for value received. Rockport, Ind., July 25, 1842. John W. Graham, Wm. Drum, John E. Cotton, Alexander Britton, Oliver Morgan, Trustees of the M. E. Church." This was held to be the note of the individuals signing it, although the face of the note would seem to indicate that the intention was to bind the church only. See *School Tp. v. Farlow*, 75 Ind. 118; *Hobbs v. Cowden*, 20 Ind. 310; *Inhabitants of Congressional Tp. No. 11 v. Weir*, 9 Ind. 234; *Prather v. Ross*, 17 Ind. 495. It has been held in a number of cases in this State that when a note is signed by one or more individual makers, and the signatures followed by the words "trustees of," etc., "president," or "secretary," such words are generally considered as descriptive of the person of the maker, and the note is the obligation of the person or persons so signing it. *McClellan v. Robe*, 93 Ind. 298; *Williams v. Bank*, 83 Ind. 237; *Hayes v. Brubaker*, 65 Ind. 27; *Hayes v. Matthews*, 63 Ind. 412; *Hays v. Crutcher*, 34 Ind. 260. In *Heffner v. Brownell*, 75 Iowa, 341, 39 N. W. Rep. 640, suit was brought on a note in substance as follows: " * * * We promise to pay Daniel Heffner, or bearer, two hundred dollars. * * * Indianapolis Mfg. Co. B. I. Brownell, Pres.; D. B. Sanford, Secy." The court held this to be the joint note of the corporation and of the other persons signing it, and that there was no ambiguity appearing upon the face of the note, and that extrinsic evidence was not admissible to show the intention of the parties. See *Matthews v. Mattress Co. (Iowa)*, 54 N. W. Rep. 225; *Lee v. Percival (Iowa)*, 52 N. W. Rep. 543; *Brunswick-Balke-Collender Co. v. Boutell (Minn.)*, 47 N. W. Rep. 261. In the case of *Swartz v. Cohen*, 11 Ind. App. 20, 38 N. E. Rep. 536, the note read:

" * * * We promise to pay to the order of * * *, National Forge & Iron Co. Mark Swartz, President." "We are of the opinion," said the court, "that the note in suit is ambiguous. It was upon that theory that the case proceeded, was tried, and determined in the court below. The appellee declared in his complaint that the appellant executed the note. If John

Doe should execute his promissory note in the name and style of Richard Roe, he would be liable thereon, and extrinsic evidence would be admissible to show the manner of the execution under proper averments in the pleadings. * * * It is readily conceivable that the note in suit might have been executed by both the corporation and by Swarts, and be their joint obligation. In such a case, affixing the word 'president' to his name does not make it the note of the corporation only, but, under proper averments, it may be shown to be the obligation of the individual as well, and this may be made to appear by extrinsic evidence." Although the fact is not disclosed by the pleading, it is admitted in the briefs of counsel for appellants and appellee that the Albany Furniture Company is a corporation. It is true, the name of the corporation was signed to the note by some officer or agent of the corporation. But the corporate name could not have been signed by both Stafford and Zapf. It might have been signed by neither, and still be binding on the corporation. The presumption that would arise, where the corporate name is followed by an officer's name, that he signed the corporate name, does not arise where the corporate name is followed by the names of two persons. In the very nature of things, the name was signed by one person, and we cannot presume that it was one to the exclusion of the other; nor can we, from the face of the instrument, presume that the name was signed by either. The appellants Stafford and Zapf were notified to appear and answer as individuals, and not as officers of the corporation. The cause of action stated was against them as individuals. Construing the complaint and the exhibit together, we see no ambiguity. It is alleged to be the joint note of the parties signing it, and the exhibit is not inconsistent with that allegation. Had there been an appearance and answer, the question of the admissibility of parol evidence might have been presented, but as the record comes to us it is not necessary to decide anything upon that question. As the cause was dismissed as to the defendants E. A. Shanklin & Co., it necessarily follows that the judgment against F. T. Gilpin was erroneous. Judgment reversed as to the appellant Gilpin, and affirmed as to the appellants Stafford and Zapf.

NOTE.—In 36 Cent. L. J. 261, will be found a collection of cases up to that date, on the subject of the principal case, appended to the case of Matthews v. Dubuque Mattress Co., wherein the Supreme Court of Iowa held that where a note reads "we promise to pay," etc., and is signed "D. M. Co. J. K. President," the note binds the president personally; parol evidence being inadmissible to show that the company was the only promisor, and that the payee knew this fact when taking it. Shortly afterwards appeared the case of Keldan v. Winegar (Mich.), 54 N. W. Rep. 901, 87 Cent. L. J. 2, wherein the strict doctrine of the Iowa court was repudiated, and the Michigan court held that where the maker of a note affixes to his signature the word "agent," parol evidence is admissible as between the immediate parties to the instru-

ment to prove that the maker executed the note in a representative capacity, and that it was so understood by the payee. The following are the more recent cases on the subject: A note which recites that "we promise to pay," and is signed, "M. N., President World's Pastime Exposition Co. A. D. Treas.," is *prima facie* the individual note of M. N. and A. D. McNeill v. Shober & Carqueville Lithographing Co. (Ill. Sup.), 33 N. E. Rep. 31. Where defendants sign a note with their individual names, adding thereto "president" and "secretary," respectively, in which note they promise to pay plaintiff bank a certain amount, and there is nothing on the face of the note to indicate a principal back of them, they are personally bound, and cannot set up a defense that they executed the note as officers of a corporation, that the loan which the note was given to secure was made to such corporation, and that the intention of both parties was that it should bind the corporation, and not defendants. San Bernardino Nat. Bank v. Andreson (Cal.), 32 Pac. Rep. 168. The fact that a resolution of the corporation, with the corporate seal thereon, authorizing defendants to make the loan and execute the note in the name of, and as the note of, the corporation, was attached to the note, was without effect, as such attachment did not make there solution a part of the note. San Bernardino Nat. Bank v. Andreson (Cal.), 32 Pac. Rep. 168. A note reciting that "we, the T. P. Company, promise to pay," etc., and signed by each of defendants, as president and secretary, respectively, purports to be the personal obligation of defendants, and will be so held on demurrer to a petition alleging the execution of it by defendants, and seeking to charge them personally. Day v. Ramsdell (Iowa), 57 N. W. Rep. 630; Tama Water Power Co. v. Ramsdell (Iowa), 57 N. W. Rep. 631. A note in form as follows, "We promise to pay," etc., and signed "C. Treas." and "C. Prest.," and with the words "Ridgewood Ice Company" printed across the end, is the personal and individual obligation of the signers. Casco Nat. Bank v. Clark, 34 N. E. Rep. 908, 139 N. Y. 307. A note signed by individuals, and reading, "We, the trustees of the H cemetery, promise to pay," is the personal obligation of those who signed it, and not of the H cemetery. Moffett v. Hampton (Ky.), 31 S. W. Rep. 881. Where a note, with the name of a corporation in the margin, signed by two persons, designated as "president" and "treasurer," respectively, is discounted for the payee without inquiry as to whether it was the note of the corporation or of the individual makers, the holder may treat it as a personal obligation of the makers. First Nat. Bank v. Stuetzer (Sup.), 30 N. Y. S. 83, 80 Hun, 435. A note given for furniture, signed by the deacons of an unincorporated church, in their official capacity, binds them individually, and not the church. Burton v. Grand Rapids School Furniture Co. (Tex. Civ. App.), 31 S. W. Rep. 51. A note signed, "Nat. F. & I. Co., M. S. President," is ambiguous, and extrinsic evidence is admissible, under proper averments, to show that it is the note of M. S. Swarts v. Cohen (Ind. App.), 38 N. E. Rep. 536. In an action on a note purporting to have been executed by corporate officers, extrinsic evidence is admissible to show that they executed the same in their official capacity, as the note of the corporation. Kraninger v. People's Bldg. Soc. (Minn.), 61 N. W. Rep. 904. A note made by a corporation, payable to "P, president" (P being president of the corporation), must be regarded as payable to P, the word "president" being merely descriptive; and an indorsement by "P, president," is an indorsement by P, individually. Hatley v. Pike

(Ill. Sup.), 44 N. E. Rep. 441, 162 Ill. 241. The following note is a corporate, and not an individual, obligation: "\$493.92. Chicago, July 22, 1898. Sixty days after date for, we promise to pay, to the order of Richey, Miniter & McDonald Co., four hundred ninety-three 92-100 dollars, at our office, 711 Unity Bldg. Value received. Columbian Athletic Club, Dominick C. O. Maley, President C. A. Club, Chas. J. Meirs, Treas." *Miers v. Coates*, 57 Ill. App. 216. In the following promissory note: "Sixty days after date, I, or we, promise to pay to the order of Geo. P. Harris & Bro., one thousand dollars, with interest at seven per cent. per annum from date. C. & A. W. L. Co., per C. I. W. Sec. G. J. W., General Manager,"—"I or we" does not mean that "I" will pay if "we" do not; but "we" is used as the pronoun meaning the corporation, while "I" means Williams, and "or" is to be construed as "and." *Harris v. Coleman-Ames White Lead Co.*, 58 Ill. App. 366. Unsubscribed stock of a bank was issued to T, its president, as trustee for the bank, and a note was given by the president, payable to the bank, signed "T., Trustee for Bank." The proceeds from any such stock, when sold, as well as all dividends thereon, were credited to the bank. Held that, on the insolvency of the bank, T was not personally liable on the note. *Neptune v. Paxton* (Ind. App.), 43 N. E. Rep. 276.

JETSAM AND FLOTSAM.

A NEW CAUSE OF ACTION FOR LOSS OF CONSORTIUM.

Ever since the diligence of the clerk in chancery was quickened by the statute of Westminster 2, *in consimili casu*, it has been recognized that the newness of the facts presented in a case, provided the case proceeds upon a recognized principle, is no reason for denying a remedy. As was said by Justice Ashurst in *Pasley v. Freeman*, 3 T. R. 51: "Where cases are new in their principle, then I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law, to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago."

It is not often, at this day, however, that courts are called upon to decide cases of first impression depending upon elementary principles regulating the relation between individuals. Recently the Supreme Court of North Carolina had substantially such a case before it in *Holleman v. Harward*, 119 N. Car. 150. It is there held that a druggist who, regardless of the husband's warnings and protests, persists in selling intoxicating drugs, in this instance laudanum, to a married woman, knowing that she uses them as a beverage, is liable to the husband for the loss of the wife's services and companionship resulting from her indulgence in the drug; the court declaring that "whoever willfully joins with a married woman in doing an act which deprives her husband of her services and of her companionship, is liable to the husband in damages."

The court points out that their researches have only brought to light one case of a like character, that of *Hoard v. Peck*, 56 Barb. (N. Y.) 202, where, upon somewhat similar facts, a like conclusion was reached.

These cases are interesting because decided on common-law principles without reference to the so-called Civil Damage Acts existing in many of our States.

The right of action in all cases of tort is to be tested by the concurrence of loss (*damnum*) and injury (*injuria*), and it is well established that *damnum absque injuria* gives no right of action.*

In this case, there is no difficulty in finding an element of legal loss. From the earliest times it has been recognized that the husband has such a property in the companionship and services of the wife that he may maintain an action for an injury resulting in a loss to him of such companionship and services. An action may be maintained, not only for the complete loss of the wife's *consortium*, as in the case of a seduction of the wife, but also in the case of a temporary loss of the wife's services and society by reason of an injury inflicted upon her. Thus, in *Guy v. Livesey*, Cro. Jac. 501, a husband brought an action for assault and battery upon the wife, "*per quod consortium uxoris sue for three days amisit*," and it was held that the action was well brought, "and a precedent was shown in 28 Ellz. Rot. in this court (King's Bench), where one Cholmley brought an action for the battery of his *feme*, *per quod negotio sua infecta remanserunt*, and had judgment to recover."

In the North Carolina case, which was decided upon demurrer, the plaintiff alleged that, by the use of the drug furnished by the defendant, his wife had become unfitted and disqualified to attend to her household duties and the care and nurture and direction of her children, whereby he was deprived of the society of his wife and of her services in his home, and his children had suffered from neglect, etc. There can be no doubt that this is a loss, a *damnum*, within the meaning of the authorities.

The real difficulty in this case arises as to the existence of a legal injury. Undoubtedly, the sale of laudanum by the defendant was in itself a lawful act, and in making the sale he was but following the vocation upon which he was dependent for his means of livelihood. The injury could only grow out of a duty not to furnish the wife with means which he knew she would use in such a way as to deprive the husband of his *consortium*.—*Law Notes*.

BOOKS RECEIVED.

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A Treatise on the Law of Indirect and Collateral Evidence. By John H. Gillett, Judge Thirty-First Judicial Circuit of Indiana. Indianapolis and Kansas City. The Bowen-Merrill Company, 1897.

American Electrical Cases (cited Am. Elect. Cas.) being a Collection of all the Important (excepting Patent cases) decided in the State and Federal Courts of the United States from 1873 on Subjects Relating to the Telegraph, the Telephone, Electric Light and Power, Electric Railway, and all other Practical Uses of Electricity with Annotations. Edited by William W. Morrill, Author of "Competency and Privilege of Witnesses," "City Negligence," etc. Vol. VI. 1896-1897. Albany, N. Y. Mathew Bender, Law Publisher, 511, 513, Broadway, 1897.

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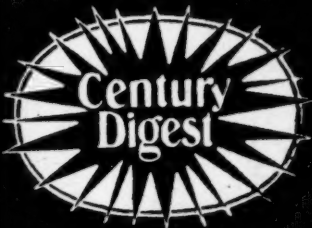
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
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